

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ROBERT STIEGLER</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 135,565
<b>JACK COOPER TRANSPORT</b>	)	
Respondent	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent requested Appeals Board review of the January 26, 1998, Award entered by Administrative Law Judge Robert H. Foerschler. On July 21, 1998, the Appeals Board heard oral argument in Kansas City, Kansas.

**APPEARANCES**

Claimant appeared by his attorney, Davy C. Walker of Kansas City, Kansas. The respondent and its insurance carrier appeared by their attorney, Stephanie Warmund of Overland Park, Kansas. There were no other appearances.

**RECORD AND STIPULATIONS**

The Appeals Board has considered the record and has adopted the stipulations listed in the Award.

**ISSUES**

On March 6, 1987, claimant was injured while he was loading automobiles on the car hauler of respondent's transport truck. The accident occurred in Milpitas, California. On the date of the accident, claimant had been employed by the respondent as an over-the-road truck driver transporting automobiles since 1983. As a result of this accidental injury, the Administrative Law Judge awarded claimant a 25 percent permanent partial general disability based upon permanent functional impairment.

Respondent appealed and contends claimant is not entitled to workers compensation benefits because claimant failed to prove he served respondent with a timely written claim for compensation as required by K.S.A. 44-520a (Ensley). Furthermore, if the claim is not barred by the timely written claim defense, respondent contends claimant's permanent partial general disability award is excessive and claimant is only entitled to a 4 percent award.

Claimant, on the other hand, contends the record proves, as a result of his work-related injury, he can no longer perform the job requirements as an automobile transport truck driver for respondent. Accordingly, the claimant contends he is entitled to 100 percent work disability.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

##### **Findings of Fact**

- (1) On March 6, 1987, claimant was hit on the head by the top ramp of the car hauler trailer when the ratchet slipped as he was working overhead chaining down a vehicle.
- (2) Claimant testified he was knocked unconscious and then transported by paramedics to the emergency room of a hospital located in San Jose, California.
- (3) Claimant was treated at the emergency room for a large scalp laceration and for complaints of pain in his upper back.
- (4) The respondent had claimant rest for a day and a half in a hotel in California. Respondent returned claimant to his home in Kansas City by airplane.
- (5) Respondent provided medical treatment for claimant's injuries through Kansas City Center for Industrial Medicine. J. Michael Smith, M.D., first saw claimant on March 9, 1987. He diagnosed claimant with a very long and deep scalp laceration, cervical strain, cerebral concussion, and right shoulder strain. Claimant was taken off work, and physical therapy and medications were prescribed.
- (6) Dr. Smith continued to treat claimant for his injuries but returned claimant to his regular work on April 7, 1987.
- (7) Approximately two weeks after claimant returned to work, respondent laid claimant off work for reasons not associated with his injury.

(8) Claimant started working as a truck driver for Holmes Freight Lines as a casual driver on May 28, 1987. This truck driving job did not require claimant to load or unload his truck. Claimant was employed full-time by Holmes Freight Lines in September 1987 and on the date of claimant's regular hearing, February 4, 1997, claimant remained a full-time truck driver for Holmes Freight Lines.

(9) In July 1987, Victoria S. Cook, M.D., Director of Kansas City Center of Industrial Medicine, took over the care and treatment of the claimant. Dr. Cook testified claimant remained symptomatic, his principle complaints being his right shoulder and headaches. Claimant was given trigger point injections and continued on medication. During the medical treatment, claimant continued to work as a truck driver for Holmes Freight Lines.

In January 1988, claimant developed neurological symptoms of vertigo and balance loss. As a result of those neurological symptoms, Dr. Cook referred claimant to Glen Sublette, M.D., a neurologist, for a second opinion. Dr. Sublette saw claimant on January 19, 1988, and ordered a CAT scan of claimant's cervical spine. The CAT scan results were found normal. Also, Dr. Cook had claimant undergo an EMG test on August 19, 1988, which was negative. Dr. Cook noted claimant had reported a nonwork-related accident on August 14, 1988, when he fell while boating which caused recurrent right shoulder pain.

(10) Dr. Cook saw claimant for the last time on September 8, 1988. Her final conclusions were head injury causing long-standing headaches which had finally resolved, mild right scapulocostal syndrome with the majority related to the work injury aggravated by the August 14, 1988, boat accident and scapulocostal syndrome superimposed on preexisting mild osteoarthritis of the cervical spine.

Claimant was released from medical care with no permanent work restrictions. Dr. Cook testified claimant was able to return to respondent's truck driving job which included the loading and unloading of automobiles. The doctor found claimant had a 5 percent permanent partial functional impairment of the whole body. Three percent was attributed to the work injury, one percent attributed to the nonwork boat accident, and one percent was attributed to claimant's preexisting cervical disc disease.

(11) Claimant's attorney requested Ronald Zipper, D.O., a board-certified orthopedic surgeon, to examine and evaluate claimant's injuries. Dr. Zipper saw claimant on two occasions, April 22, 1994, and August 12, 1996. Dr. Zipper had available for his review claimant's prior medical treatment records.

Based on the history taken from claimant, his physical examination, and a review of the medical records, Dr. Zipper diagnosed resolved lacerated scalp, post traumatic cephalalgia (headaches), and cervical radiculopathy. In accordance with the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), Dr. Zipper opined claimant's permanent functional impairment for all injuries was 27 percent. Utilizing the

AMA Guides combined value tables, the doctor combined a 5 percent whole person rating for claimant's headaches with a 23 percent rating for a cervical herniated disc, loss of cervical range of motion, and right upper extremity reflex and strength loss to arrive at the 27 percent rating. The doctor permanently restricted claimant from reaching overhead and limited lifting to 20 pounds. He further believed claimant could not return to loading and unloading automobiles for respondent.

(12) The Administrative Law Judge appointed Revis C. Lewis, M.D., to perform an independent medical examination of claimant. After taking a history from claimant, reviewing medical records, and performing a physical examination of claimant, Dr. Lewis diagnosed claimant with cervical strain with fibromyalgia type reaction and possibility of a very mild thoracic outlet syndrome. The doctor assessed claimant's permanent functional disability as 10 to 12 percent of the body as a whole, plus 5 percent for claimant's post-traumatic headaches. He restricted claimant to avoid working above the head, avoid repetitive motion of the neck, and limited lifting to 50 pounds.

(13) After the March 6, 1987, accident, claimant testified he received a workers compensation claim form from the State of Kansas. He further testified he completed the claim form, took the claim form to respondent's office in Kansas City, and gave the claim form to Marilyn McCann, who was an employee of the respondent in the Kansas City office.

(14) Claimant testified, because of his work-related injuries, he could no longer perform the portion of respondent's truck driving job that required him to load and unload automobiles.

#### Conclusions of Law

(1) K.S.A. 44-520a (Ensley) required a claimant to serve a written claim for compensation benefits on respondent within 200 days after the date of his or her accident.

Claimant's uncontradicted testimony established he served a written claim for compensation benefits on respondent within one month of the date of the accident. The Appeals Board concludes claimant has proved that he served a timely written claim on respondent for compensation of benefits as a result of his March 6, 1987, work injury.

(2) On the date of claimant's accident, March 6, 1987, work disability was defined as follows:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the workman to engage in work of the same type and character that he was performing at the time of his injury, has been reduced. K.S.A. 44-510e(a) (Ensley).

(3) Where a claimant is found to suffer a work disability, the pivotal question is what portion of claimant's job requirements is the claimant unable to perform because of injury. The work disability will then be measured by the reduction, expressed as a percentage, in the worker's ability to engage in work of the same type and character that he or she was performing at the time of injury. See Ploutz v. Ell-Kan Co., 234 Kan. 953, 955, 676 P.2d 753 (1984).

(4) An award can be based on functional disability where the percentage of work disability is less, is not proven, or there is none. Desbien v. Key Milling Co., 3 Kan. App. 2d 43, 588 P.2d 482 (1979).

(5) The burden is on the claimant to establish his right to an award of compensation and to prove the various conditions on which his right depends. K.S.A. 44-501(a) (Ensley).

(6) Claimant testified, that because of his work-related injuries, he could no longer perform the portion of the respondent's truck driving job that required him to load and unload automobiles. However, the Appeals Board concludes the claimant is also required to prove what percentage of the job requirements claimant lost the ability to perform because of his work-related injuries. See K.S.A. 44-510e(a) Ensley and Ploutz v. Ell-Kan Co., 234 Kan. 953, 676 P.2d 753 (1984).

(7) The Appeals Board concludes there is no evidence in the record for the Appeals Board to make a finding as to what percentage of the job requirements claimant lost the ability to perform because of his work-related injuries. Therefore, the Appeals Board concludes claimant has failed to prove a work disability.

(8) The Administrative Law Judge based his 25 percent permanent partial general disability award on the functional impairment ratings of Dr. Lewis and Dr. Zipper. The Administrative Law Judge reasoned those two functional impairment ratings were fairly consistent. The Appeals Board agrees that Dr. Zipper's 27 percent functional impairment rating and Dr. Lewis' 16 percent functional impairment rating have somewhat of a closer relationship than the 4 percent rating Dr. Cook attributed to claimant's work injury and his preexisting disc disease. However, the Appeals Board concludes it is significant that both Dr. Lewis and Dr. Zipper based their functional impairment ratings on the examination of claimant some 9 and 7 years, respectively, after claimant's March 6, 1987, accidental injury. Additionally, both Dr. Zipper and Dr. Lewis were hired for the sole purpose of examining and evaluating claimant for a functional impairment rating and placing permanent restrictions on claimant's activities.

In contrast, Dr. Cook was claimant's treating physician and had the opportunity to examine and treat contemporaneous with claimant's March 6, 1987, accident and saw claimant on numerous occasions from July 1997 through September 8, 1988.

The Appeals Board concludes Dr. Cook's medical opinions are the most credible and persuasive medical evidence contained in the record. Accordingly, the Appeals Board finds Dr. Cook's functional impairment rating should be given the most weight in determining claimant's appropriate permanent partial general disability award.

It is the function of the trier of fact to decide which testimony is more accurate and credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. See Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). The Appeals Board concludes, giving Dr. Cook's 4 percent functional impairment rating the most weight, that claimant is entitled to a 10 percent permanent partial general disability.

### **AWARD**

**WHEREFORE**, the Appeals Board finds the Award entered by Administrative Law Judge Robert H. Foerschler dated January 26, 1988, should be, and is hereby, modified as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Robert Stiegler, and against the respondent, Jack Cooper Transport, and its insurance carrier, Liberty Mutual Insurance Company, for accidental injuries which occurred on March 6, 1987, and based upon an average weekly wage of \$762.45.

Claimant is entitled to 4.43 weeks of temporary total disability compensation at the rate of \$247 per week or \$1,094.21, followed by 410.57 weeks of permanent partial disability at the rate of \$50.83 per week or \$20,869.27 for a 10% permanent partial general disability, making a total award of \$21,963.48, which is presently all due and owing.

All authorized medical expenses are ordered to be paid by the respondent.

The Appeals Board approves and adopts all remaining orders contained in the Award.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 1998.

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BOARD MEMBER

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BOARD MEMBER

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**BOARD MEMBER**

c: Davy C. Walker, Kansas City, KS  
Stephanie Warmund, Overland Park, KS  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director